DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 07-0228
Sales and Use Tax
For Tax Years 2004-2005

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. **Sales and Use Tax**—Public Transportation Exemption**.**

Authority: IC § 6-8.1-5-1; IC § 6-2.5-5-27; 45 IAC 2.2-3-20; 45 IAC 2.2-5-61; *Carnahan Grain, Inc. v. Indiana Dep't of State Revenue*, 828 N.E.2d 465 (Ind. Tax Ct. 2005); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988).

Taxpayer protests the assessment of sales and use tax on a variety of transportation equipment purchases.

II. **Sales and Use Tax**—Truck Purchase.

Authority: IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales and use tax on its purchase of a truck.

III. **Tax Administration**—Negligence Penalty**.**

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana distributor of lawn care products and golf course accessories. Taxpayer is a parent corporation with a subsidiary LLC that is a disregarded entity for tax purposes. After an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for additional sales and use tax for the 2004 and 2005 tax years. Taxpayer protests the assessments claiming that its purchases of certain transportation equipment were eligible for the public transportation exemption. Further facts will be supplied as required.

I. **Sales and Use Tax**—Public Transportation Exemption**.**

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased various pieces of transportation equipment without paying sales tax at the time or purchase, and assessed used tax on the purchases.

The Department refers to 45 IAC 2.2-3-20, which provides:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [45 IAC 2.2-3-19] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Taxpayer maintains that since its subsidiary LLC transports lawn care products and golf course accessories to Taxpayer's customers, Taxpayer's transportation equipment qualifies for the public transportation exemption. The exemption is found at IC § 6-2.5-5-27, which states:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

Also of relevance is 45 IAC 2.2-5-61, which states in relevant part:

> (a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.
> (b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property **for consideration** by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of

> Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; **however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.**
> (c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.
> ….
> (**Emphasis Added**).

The Indiana Tax Court has addressed the question of how to apply the public transportation exemption. In *Carnahan Grain, Inc. v. Indiana Dep't of State Revenue,* 828 N.E.2d 465, 468 (Ind. Tax Ct. 2005):

> [I]f the property is not predominately used for third-party transportation (i.e., it is predominantly used to transport the taxpayer's own property), then the taxpayer is not entitled to the exemption.

In summary, in order to qualify for the public transportation exemption the taxpayer must show that the equipment purchased was predominantly used to transport property of a third party for which the taxpayer received consideration.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

During the course of the protest, Taxpayer provided various documents to demonstrate that the subsidiary LCC is licensed as a public transportation company. Taxpayer asserts that since its subsidiary LLC is licensed as a public transportation company, the transportation equipment used by the subsidiary LLC qualifies for the public transportation exemption. However, as provided above, "the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration." 45 IAC 2.2-5-61(b).

Additionally, Taxpayer submitted a Revenue Ruling issued on April 20, 2006, in support of its contention that a wholly owned LCC of a parent corporation could qualify for the public transportation exemption. However, the facts in that situation, which involve established arms-length transactions, separate bank accounts, and separate accounting systems, are not identical to the Taxpayer's situation.

During the course of protest, Taxpayer also provided various titling documents, invoices from customers, and a consolidated income statement to demonstrate that the subsidiary

LCC owned transportation equipment that was used to transport property of a third party for consideration. However, the documentation submitted was insufficient to establish that Taxpayer's subsidiary owned transportation equipment that was predominantly used to transport the property of another for consideration. The titling documents do not establish that the subsidiary purchased or financed the purchase of the transportation equipment. In fact, the one purchase document that was submitted demonstrates that the parent company purchased that piece of transportation equipment. The customer invoices submitted show that the customers were not charged for transportation, i.e., the invoices included a line item of zero for shipping. The consolidated income statement provided did not represent what the Taxpayer reported on its federal and Indiana income tax returns.

As previously explained, the burden of proving an assessment wrong rests with Taxpayer, under IC § 6-8.1-5-1(c). As explained in *Carnahan Grain*, the public transportation exemption applies only to entities hauling the property of others for consideration. Since the documentation submitted was insufficient to establish that Taxpayer's transportation equipment was predominantly used in transporting the property of another for consideration, Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. **Sales and Use Tax**—Truck Purchase.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased a 2005 truck without paying sales tax at the time or purchase, and assessed use tax on the purchase.

Taxpayer protests the imposition of use tax on its purchase and use of a 2005 truck. Taxpayer asserts that the Department incorrectly assessed tax on the 2005 truck twice because the audit report listed the purchase in both March of 2004 and in March of 2005. Taxpayer has provided sufficient information to demonstrate that the 2005 truck, found on page seven of report control number 305847-06 with a purchase price of $34,228.75, and the 2005 truck, found on page twelve of the report control number 305847-06 with a purchase price of $34,228.75, is the same vehicle.

FINDING

Taxpayer's protest is sustained.

III. **Tax Administration**—Negligence Penalty**.**

DISCUSSION

Taxpayer protests the imposition of the ten (10) percent negligence penalties for the tax years in question. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person . . . incurs, upon examination by the department, a deficiency that is due to negligence . . . the person is subject to a penalty."

The Department also refers to 45 IAC 15-11-2(b), which states:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive the negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency was not due to Taxpayer's negligence, but was due to reasonable cause as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is sustained.

AB/WL/DK—January 29, 2008